KETUA POLIS NEGARA & ANOR

v.

GAN BEE HUAT & OTHER APPEALS

SUPREME COURT, PULAU PINANG
LAMIN MOHD YUNUS PCA
MOHD AZMI FCJ
ZAKARIA YATIM FCJ
[CRIMINAL APPEAL NO: 05-183-92]
15 MAY 1998

CRIMINAL PROCEDURE: *Disposal of property - Seizure of movable property - Section 32(1) Dangerous Drugs (Forfeiture of Property) Act 1988 - Whether seizure unlawful - Whether police dutybound but failed to serve notice of seizure - Whether service of notice thereof dispensed with - No action taken under s. 32(1)(a), (b) or (c) of Act - Whether seized property automatically forfeited - Section 32 of Act - Whether unconstitutional - Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 8, 9, 25(2), 32(1)(a), (b), (c), (2) - Federal Constitution, arts. 13, 149(1)*

The respondents' property in these cases were seized by the police pursuant to s. 32(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). Dissatisfied, the respondents applied for the return of the property on the ground that the seizure was unlawful. In the court below, the respondent contended that the seizure was illegal as the police, in effecting seizure, had not served them with notice of seizure under s. 25 of the Act. It was the respondents' stand that, in this respect, since the Public Prosecutor had not taken or intended to take any proceedings under Part III of the Act against any of the respondents, the requirement of serving the notice could not be dispensed with. The respondents further contended that the seizure was likewise vitiated by the failure to serve them with the s. 9 notice, which would otherwise enable them to attend the High Court and show cause as to why the property should not be forfeited. It was also submitted that s. 32 of the Act was inconsistent with art. 13 of the Federal Constitution, and the seizure was therefore unconstitutional in law. Adverting to the arguments, the learned Judicial Commissioner allowed the application and consequently ordered that the seized property be returned to the respondents.

It was not in dispute that under s. 32(1) of the Act, if no action as described in para (a), (b) or (c) thereof had been taken with regard to the property already seized within three months from the date of seizure, the property would henceforth become forfeited. The facts herein showed that, following the

seizure, no *ex parte* application was made by the Public Prosecutor for an order of forfeiture under s. 8 of the Act, and hence no proceedings were commenced by him to forfeit the property under Part III within the meaning of s. 32(1)(b) of the Act. Likewise, no prosecution for any offence of law was instituted by the Public Prosecutor with regard to the property pursuant to s. 32(1)(a) of the Act, and further, no claim to the property was ever made by the respondents pursuant to s. 32(1)(c) of the Act. These apart, it was common ground that the property were seized in the presence of the respondents, and that the premises where the seizures took place belonged to the respondents.

Following the present appeals, arguments were put forth by the Public Prosecutor that: (i) as the property were seized in the respondents' presence, the requirement of serving the notice of seizure had been dispensed with by virtue of the proviso to s. 25(2); (ii) the cases here were governed by s. 32 of the Act, and that being so, the question of issuing the s. 9 notice did not at all arise; and (iii) section 32 of the Act was not vitiated by any illegality bearing in mind the provisions of art. 149(1) of the Federal Constitution.

Held:
Per Lamin Mohd Yunus PCA

[1] In the case of a seizure made in presence of the owner of the affected property the question of taking up any proceedings under Part III against him does not arise because he is excluded as he comes in the second limb of the proviso to s. 25(2).

[1a] In the present cases, there was an admission by the respondents, in the supporting affidavits that they affirmed that resulted in the Judicial Commissioner's orders of 4 July 1992, to the effect that the premises where searches and seizures took place in fact belonged to them. So also was their admission in regard to the affected property. All the four cases thus fall squarely within the proviso which stipulates that such notice shall not be required to be served where the seizure is made in the presence of the owner. There is therefore no basis for the respondents' complaint that notice under s. 25 of the Act had never been served on them.

[2] If any positive action is to be taken under Part III, it would be one under ss. 8 and 9 of the Act. Under s. 8(1), however, the Public Prosecutor has a discretion whether or not to make the *ex parte* application for the forfeiture of the property.

[2a] For the notice to issue under s. 9, there must first be an *ex parte* application made before the High Court by the Public Prosecutor under s. 8 for an order of forfeiture of any property in possession of any person whom he 'has reason to believe' is a liable person. Upon being satisfied on the *ex parte* application, the High Court will then issue a notice to the 'liable person' calling upon him to come before the said High Court on a date specified in the notice to show cause why the property as identified under s. 8(2) should not be forfeited.

[2b] In the present cases, however, the Public Prosecutor has not opted to make the *ex parte* application, and that being so, the question of issuing the notice under s. 9, therefore, does not arise. It is also to be noted that, since the Public Prosecutor does not move under the provisions of Part III, the matter of seizure ends there until s. 32 becomes operative.

[3] The Public Prosecutor, by not making the *ex parte* application under s. 8(1), has satisfied para (b) of s. 32(1). And there being no prosecution instituted by him under any law with regard to the property seized, the condition as required by para (a) of s. 32(1) has also been fulfilled.

[3a] In these cases, none of the respondents has made any claim to the seized property, or filed an affidavit deposing to any attempt to file a claim in writing as required by s. 32(2). No explanation was thus offered by the respondents as to why they could not make the claim to the police or the Public Prosecutor. That being so, the conclusion is irresistable that the respondents had no reason whatsoever, valid or otherwise, to explain their failure to make the claim. Paragraph (c) of s. 32(1), therefore, has likewise been satisfied.

[4] Since none of the circumstances mentioned under paras (a), (b) and (c) of s. 32(1) has taken place within three months from the date of seizure of the property affected, forfeiture must automatically take effect.

[5] The argument that s. 32 of the Act is inconsistent with art. 13 of the Federal Constitution is really a non-starter. The Dangerous Drugs (Forfeiture of Property) Act 1988 was enacted by Parliament pursuant to art. 149 of the Federal Constitution. Article 149 *inter alia* expressly provides that any provision of law enacted under the Article is valid "notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13". Even assuming therefore that s. 32 is inconsistent with art. 13, by the express authority of art. 149(1), the said section shall remain valid. Section 32 cannot be challenged on the ground that it is inconsistent with art. 13 of the Federal Constitution.

[Appeal allowed; seizure of property affirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Harta responden-responden dalam kes-kes ini telah disita oleh polis selaras dengan s. 32(1) Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta tersebut'). Responden-responden yang berasa tidak berpuashati telah memohon pemulangan kembali harta tersebut atas alasan bahawa penyitaan itu tidak sah di sisi undang-undang. Dalam mahkamah di bawah, responden telah menegaskan bahawa penyitaan itu adalah tak sah kerana polis, dalam menguatkuasakan penyitaan itu, telah tidak menyampaikan kepada mereka notis penyitaan di bawah s. 25 akta tersebut. Ianya merupakan pendirian responden-responden bahawa, sehubungan dengan perkara ini, oleh kerana Pendakwa Raya telah tidak mengambil atau berniat untuk mengambil sebarang prosiding di bawah Bahagian III Akta tersebut terhadap mana-mana daripada responden-responden tersebut, syarat menyampaikan notis tersebut tidak dapat diberikan. Responden-responden selanjutnya menegaskan bahawa penyitaan tersebut adalah juga dipatahkan oleh kegagalan untuk menyampaikannya bersama-sama dengan notis s. 9, yang mana akan sebaliknya membolehkan mereka menghadiri Mahkamah Tinggi dan menunjukkan sebab mengapa harta tersebut tidak seharusnya dirampai. Adalah juga dihujahkan bahawa s. 32 Akta tersebut adalah tak konsisten dengan per. 13 Perlembagaan Persekutuan, dan penyitaan tersebut adalah dengan itu tidak berperlembagaan di sisi undang-undang. Dalam menentang penghujahan-penghujahan tersebut, Pesuruhjaya Kehakiman yang bijaksana telah membenarkan permohonan tersebut dan berikutan itu memmerintahkan bahawa harta yang telah disita itu dikembalikan kepada responden-responden.

Adalah tidak dipertikaikan bahawa di bawah s. 32 Akta tersebut, jika tiada tindakan sepertimana yang diterangkan dalam perenggan (a) (b) atau (c) seksyen tersebut telah diambil berhubung dengan harta yang telah pun di sita itu dalam tempoh tiga bulan daripada tarikh-tarikh penyitaan, harta tersebut selepas itu akan menjadi terlucuthak. Fakta-fakta di sini menunjukkan bahawa, berikutan dengan penyitaan itu, tiada permohonan *ex parte* telah dibuat oleh Pendakwa Raya untuk mendapatkan perintah perlucuthakan di bawah s. 8 Akta tersebut, dan dengan itu tiada prosiding telah dimulakan oleh beliau untuk melucuthak harta tersebut di bawah Bahagian III di dalam lingkungan maksud s. 32(1)(b) Akta tersebut. Begitu juga, tiada pendakwaan bagi sebarang kesalahan undang-undang telah dimulakan oleh Pendakwa Raya sehubungan dengan harta tersebut selaras dengan s. 32(1)(a) Akta tersebut, dan selanjutnya, tiada tuntutan kepada harta tersebut pernah dilakukan oleh responden-responden selaras dengan s. 32(1)(c) Akta tersebut. Selain itu, ianya merupakan alasan biasa bahawa harta tersebut telah disita dalam kehadiran responden-responden, dan bahawa premis-premis di mana penyitaan-penyitaan itu berlaku merupakan kepunyaan responden-responden.

Berikutan dengan rayuan-rayuan semsa, hujahan-hujahan telah dikemukakan oleh Pendakwa Raya bahawa: (i) oleh kerana harta tersebut telah disita dalam kehadiran responden-responden, keperluan atau syarat menyampaikan notis penyitaan telah diberikan menurut peruntukan s. 25(2); (ii) kes-kes di sini dikuasai oleh s. 32 Akta tersebut, dan oleh yang demikian, persoalan mengeluarkan notis s. 9 tidak sama sekali berbangkit; (iii) seksyen 32 Akta tersebut tidak dipatahkan oleh mana-mana kepenyalahan undang-undang dengan memikirkan peruntukan-peruntukan per. 149(1) Perlembagaan Persekutuan.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Dalam kes suatu penyitaan yang dibuat dalam kehadiran tuanpunya harta yang terjejas persoalan mengambil sebarang prosiding di bawah Bahagian III terhadapnya tidak berbangkit kerana beliau tidak terlingkung di dalamnya kerana beliau termasuk di dalam bahagian kedua peruntukan kepada s. 25(2).

[1a] Dalam kes-kes semasa, terdapat pengakuan oleh responden-responden, dalam afidavit-afidavit sokongan yang telah mereka ikrarkan yang mengakibatkan perintah-perintah Pesuruhjaya Kehakiman bertarikh 4 Julai 1992, yang bererti bahawa premis-premis tersebut di mana penggeledahan-penggeledahan dan penyitaan-penyitaan telah berlaku pada hakikatnya kepunyaan mereka. Begitu juga dengan pengakuan mereka berhubung dengan harta yang telah terjejas itu. Keempat-empat kes tersebut dengan itu nyata di dalam peruntukan yang menentukan bahawa notis yang sedemikian tidak perlu disampaikan di mana penyitaan dibuat dalam kehadiran tuanpunya. Dengan itu tidak terdapat sebarang asas bagi aduan responden-responden tersebut bahawa notis di bawah s. 25 Akta tersebut tidak pernah disampaikan ke atas mereka.

[2] Jika sebarang tindakan positif hendak diambil di bawah Bahagian III, ianya harusnya suatu tindakan di bawah ss. 8 dan 9 Akta tersebut. Namun begitu, di bawah s. 8(1), Pendakwa Raya mempunyai budibicara sama ada hendak atau tidak membuat permohonan *ex parte* tersebut untuk penyitaanharta tersebut.

[2a] Untuk mengeluarkan notis tersebut di bawah s. 9, terdahulunya haruslah terdapat permohonan *ex parte* yang telah dibuat di hadapan Mahkamah Tinggi oleh Pendakwa raya di bawah s. 8 untuk mendapatkan perintah penyitaan akan mana-mana harta dalam simpanan mana-mana orang yang beliau ‘mempunyai alasan untuk mempercayai” bahawa orang itu adalah seseorang yang bertanggungan dan harta tersebut adalah merupakan harta

yang tidak sah di sisi undang-undang. Setelah berpuashati dengan permohonan *ex parte* tersebut, Mahkamah Tinggi akan dengan itu mengeluarkan satu notis kepada "orang yang bertanggungan" meminta beliau menghadiri Mahkamah Tinggi pada tarikh yang ditetapkan dalam notis tersebut bagi menunjukkan sebab mengapa harta tersebut sepertimana yang dikenalpasti di bawah s. 8(2) tidak seharusnya disita.

[2b] Walaubagaimanapun, dalam kes-kes semasa, Pendakwa Raya telah tidak memilih untuk membuat permohonan *ex parte*, dan dalam keadaan yang sedemikian, persoalan pengeluarkan notis di bawah s. 9, dengan itu, tidak berbangkit. Adalah juga harus diambil perhatian bahawa, oleh kerana Pendakwa Raya tidak mengusul di bawah peruntukan-peruntukan Bahagian III, perkara penyitaan berakhir di situ sehingga s. 32 menjadi boleh dilaksanakan.

[3] Pendakwa Raya dengan tidak membuat permohonan di bawah s. 8(1), telah memenuhi perenggan (b) s. 32(1). Dan oleh kerana tidak terdapatnya pendakwaan yang dimulakan oleh beliau di bawah mana-mana undang-undang berhubung dengan harta yang disita tersebut, syarat sepertimana yang diperlukan oleh perenggan (a) s. 32(1) telah juga dipenuhi.

[3a] Dalam kes-kes ini, tidak satu pun daripada responden-responden telah membuat sebarang tuntutan kepada harta yang disita itu, atau memfailkan satu afidavit yang melupuskan sebarang percubaan untuk memfailkan sesuatu tuntutan bertulis sepertimana yang dikehendaki oleh s. 32(2). Dengan itu tiada penjelasan telah diberikan oleh responden-responden mengenai mengapa mereka tidak boleh membuat tuntutan tersebut kepada polis atau Pendakwa Raya. Dalam keadaan yang sedemikian, kesimpulannya tidak dapat dielakkan bahawa responden-responden tidak mempunyai alasan apa pun, sah atau sebaliknya, untuk memperjelaskan kegagalan mereka untuk membuat tuntutan tersebut. Perenggan (c) s. 32(1) dengan itu, telah juga dipenuhi.

[4] Oleh kerana tidak satu pun daripada keadaan-keadaan itu yang disebut di bawah perenggan (a), (b) dan (c) s. 32(1) telah berlaku dalam tempoh tiga bulan daripada tarikh penyitaan harta yang terjejas itu, perlucuthakan mestilah secara otomatik berkuatkuasa.

[5] Penghujahan bahawa s. 32 Akta tersebut adalah tak konsisten dengan per. 13 Perlembagaan Persekutuan adalah sesungguhnya bukannya pemula. Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 telah digubal oleh Parlimen selaras dengan per. 149 Perlembagaan Persekutuan. Perkara 149 antara lainnya dengan nyata memperuntukkan bahawa mana-

mana peruntukan undang-undang yang digubal di bawah Perkara tersebut adalah sah "meskipun bahawa ianya tak konsisten dengan mana-mana peruntukan Perkara-Perkara 5, 9, 10 atau 13." Walaupun mengandaikan dengan itu bahawa s. 32 adalah tak konsisten dengan per. 13, melalui autoriti nyata per. 149(1), sekseyen tersebut akan kekal sah. Seksyen 32 tidak boleh dicabar atas alasan bahawa ianya tak konsisten dengan per. 13 Perlembagaan Persekutuan.

[Rayuan dibenarkan; penyitaan harta diikrarkan.]

Case referred to:
Public Prosecutor v. Lau Kee Hoo [1983] 1 CLJ 21 ***(foll)***

Legislation referred to:
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 8(1), (2), 9(1), 16, 25(2), 32(1)(a), (b), (c), (2), (3)
Federal Constitution, arts. 4(1), 13, 149(1)

[Appeal from High Court, Pulau Pinang; Criminal Application No: 44-53-1991]

For the appellants - Mohd Yusof Zainal Abidin DPP
For the respondents - Shanmugam; M/s Shanmugam & Co

Reported by WA Sharif

JUDGMENT

Lamin Mohd Yunus PCA:

We heard these four appeals at our sitting in Pulau Pinang on 13 April 1998. We allowed them and quashed the orders of the learned Judicial Commissioner made on 4 July 1992 which declared that the seizure made by the police in respect of the property described therein was not done according to law and therefore illegal. He ordered that the property be returned to the respective applicants/respondents. In substitute, we made the order of forfeiture of the affected property as required under s. 32(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 (Act 340) (hereafter referred to as "the Act"). We shall explain the full effect of the said section and indicate the items of property to be forfeited in our judgment presently.

For the purpose of arguing the appeals it was agreed for reasons of convenience between the learned Deputy Public Prosecutor and learned counsel for the respondents that the appeal No. 4 (05-247-92) would be treated as the main appeal as the facts in the other three appeals were no different except as to dates when similar actions were taken by the police.

In appeal No. 4, on 8 April 1989 the police entered and searched the premises of the respondent. In the course of the search, the police from the Anti-Dadah Branch seized a number of items as follows: (a) notes amounting to RM43,000 wrapped in a Chinese newspaper found in a wardrobe, (b) notes amounting to RM65,000 kept in a milo tin found in a compartment of a bed in the respondent's bedroom, (c) notes amounting to RM1,544 found in a trouser pocket, (d) a motor-car driving licence of the respondent, (e) an international passport No. A 3276690 in the name of the respondent found in a drawer of a writing table and (f) a motor-car, a Honda Accord Registration No. BCF 6231 found just outside the house. Search lists were prepared and acknowledged by the respondent by putting his signature on them. Of course as we have indicated earlier similar actions were taken by the Anti-Dadah Branch of the police in the other three cases though on different dates. But for the purpose of seizure at the premises, search lists were prepared and similarly acknowledged by the respective respondents. In this regard the learned Deputy Public Prosecutor informed the court that the seizures of all the items appearing in the search lists in respect of the four cases were made in the presence of all the respondents. The learned counsel for the respondents agreed.

On 11 Jun 1991 the counsel for the respondent in the appeal No. 4 filed a criminal application praying for an order that the seizure was unlawful as it was done not according to law and the property so seized must be returned to the applicants. Similar applications were filed by the same counsel in respect of the other cases. All the four applications were heard at the same time and on the same day (4 July 1992) order in terms was granted in respect of each of them.

We were told however that the property had not been returned to the respondents as ordered because of the pending appeal and were still with the police.

For the purpose of making the aforesaid applications, the respondents in their affidavits had four main complaints against the actions taken by the police namely:

a) No search list in respect of the items seized under s. 16 of the Act;

b) No notice of seizure under s. 25 of the Act had ever been served on the respondents;

c) No notice under s. 9 of the Act to attend the High Court to show cause why all or any of the property should not be forfeited;

d) Section 32 is inconsistent with art. 13 of the Federal Constitution.

With regard to the first complaint no further argument need be pursued because search lists had been prepared and properly acknowledged by the respondents.

The second complaint has absolutely no foundation. Section 25 reads:

> **25. Seizure of movable property.**
>
> (1) Any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or illegal property, shall be liable to seizure.
>
> (2) Whenever any movable property is seized under subsection (1), the officer effecting the seizure shall as soon as practicable serve a notice in writing of such seizure and the grounds thereof on the owner of such property, if such owner and his whereabouts are known:
>
> Provided that such notice shall not be required to be served where such seizure is made in the presence of the person against whom proceedings under Part III are intended to be taken, or in the presence of the owner of such property or his agent, or in the case of a ship or an aircraft, in the presence of the master or pilot, as the case may be.
>
> (3) Subsection (1) shall not apply to any ship of more than one hundred tons burden, or to any train or to any aircraft, belonging to any person carrying on a regular lawful passenger or freight service within Malaysia or to and from Malaysia, except where prosecution for an offence under this Act is to be instituted, or proceedings under Part III are to be taken, against the owner of such ship, train or aircraft.

It may be recalled that the learned counsel for the respondents agreed with the learned Deputy Public Prosecutor that the affected property in the four cases were seized in the presence of his clients, the respondents. But he said that the proviso to s. 25(2) provides that the notice would only be dispensed with if the "seizure is made in the presence of the person against whom proceedings under Part III are intended to be taken or in the presence of the owner." He said no proceedings under Part III has been taken against any of his clients. In our view if any positive action is to be taken under Part III, it would be one under ss. 8 and 9 of the Act, the operation of which we shall soon explain when we deal with the third complaint. However we need only say at this juncture that the reading of s. 8(1) would appear to suggest that the Public Prosecutor has the discretion whether or not to make the *ex parte* application. Under the proviso to s. 25(2) the intention to take up any proceedings under Part III may exist at the time when the decision to investigate with the view to conduct a search by the police. But upon completion of an investigation and a search by the police culminating in a

seizure, the final decision as to what steps to take thereafter in particular those spelt out in ss. 8 and 9 would be that of the Public Prosecutor. If the Public Prosecutor does not move under the provisions of Part III, the matter of seizure ends there until s. 32 becomes operative. We shall deal with the operation of s. 32 in the later part of our judgment.

The court also asked the learned counsel for the respondents for his view in the case where the seizure is made in the presence of the owner of the property. He was unable to assist us. In the case of a seizure made in the presence of the owner of the affected property the question of taking up any proceedings under Part III against him does not arise because he is excluded as he comes in the second limb of the proviso. For the purpose of the operation of the proviso in regard to the meaning of the word "owner" we are of the view that an admission in the various affidavits in support of the applications that resulted in the Judicial Commissioner's orders of 4 July 1992 can be relied upon. The admission was to the effect that premises where searches and seizures took place belonged to the respondents. So also was the admission in regard to the affected property. All the four cases fall squarely within the proviso which stipulates that such notice shall not be required to be served where the seizure is made in the presence of the owner.

As to the third complaint, the learned Deputy Public Prosecutor submitted that the issuance of a notice under s. 9 did not arise because his contention was that the cases were in fact governed by s. 32 of the Act. Now, for the notice to issue under s. 9, there must first be an *ex parte* application made before the High Court by the Public Prosecutor under s. 8 for an order of forfeiture of any property in possession of any person whom he "has reason to believe" that the person is a liable person and the property is an illegal property. For ease of reference we reproduce the relevant provisions of the Act in this regard, namely ss. 8(1), 8(2) and 9(1). They read:

8. Application to the High Court.

(1) If the Public Prosecutor has reason to believe that any person is a liable person he may apply *ex parte* to the High Court for an order of forfeiture of all the properties of which such person is a holder and which the Public Prosecutor has reason to believe are illegal properties.

(2) The application, supported by an affidavit or affidavits, shall –

(a) identify the liable person to be proceeded against, state his address of residence or business, if known, and other relevant particulars, which are known;

(b) state the grounds on which he is a liable person,

(c) identify the properties to be forfeited, set out their estimated value, and, if known, their location; and

(d) state any other matter, circumstance or information which, in the opinion of the Public Prosecutor, is relevant to the application.

9. Notice to show cause against forfeiture.

(1) If at the hearing of the application of the Public Prosecutor under section 8(1), the High Court is satisfied that the application is made in accordance with the requirement of section 8, the court shall issue a notice upon the liable person specified in the application (hereinafter in this Act referred to as the "person affected") and annexing thereto the affidavit or affidavits referred to in section 8(2), and calling upon the person affected to attend before the High Court on a date specified in the notice, which shall not be less than thirty days from the date of the notice, to show cause why all or any of the properties identified under section 8(2)(c), should not be forfeited.

Upon being satisfied on the *ex parte* application, the High Court will then issue a notice to the "liable person" calling upon him to attend before the said High Court on a date specified in the notice to show cause why the property as identified under s. 8(2) should not be forfeited.

As we understand the law, the Public Prosecutor may or may not take the option to make the application under s. 8(1). It is entirely at his discretion. In the cases before us he opted **not** to make the application. In our view this has satisfied para. (b) of sub-s. (1) of s. 32. At this point we should mention that as a fact no prosecution under any law has been instituted with regard to the property seized. Therefore the condition as required under para. (a) of sub-s. (1) of s. 32 has been fulfilled. As a result he availed himself of the benefit of s. 32(1)(c). To appreciate fully the operation of s. 32(1)(c), perhaps we need to reproduce only sub-ss. (1), (2) and (3) of the said section which read:

32. **Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto.**

(1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and –

(a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,

within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

(3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

In the cases before us, if it is shown that no action as described in para. (a), (b) or (c) of sub-s. (1) of s. 32 has been taken with regard to the property already seized within three months from the date of seizure, the property shall become forfeited immediately upon the expiration of the said period. We have however mentioned earlier that no action as described in either para. (a) or (b) of sub-s. (1) has been taken. But para. (c) requires that if a claim in writing is made to the Public Prosecutor or the police at any time within the said period of three months to the effect that he is lawfully entitled to the property and that the property is not liable to forfeiture, it is incumbent on the part of the Public Prosecutor to refer the claim to the Sessions Court within 14 days after the expiration of the said period of three months for its decision (sub-s. (2)). Upon receipt of the Public Prosecutor's reference, the Sessions Court shall then issue a summons requiring the person claiming to appear and upon appearance the court shall proceed with the inquiry with the view to ascertain, to its satisfaction, whether an offence under the Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property. If no such offence has been committed and that the property is not an illegal property within the meaning of the Act, the court shall release the property to the person making the claim upon proof that he is entitled thereto. In any other case, the court shall order the property to be forfeited (sub-s. (3)). Until the day of the hearing of the four appeals by us (a period of eight to nine years from the date or dates of seizure), none of the respondents has made

any claim. Their counsel submitted that there was no way for the respondent to make the claim because soon after he was arrested by the police on 8 April 1989 he was further detained at Pulau Jerejak for two years commencing from 5 June 1989. However the learned counsel admitted that he did visit the respondent (in appeal case No. 4) at Pulau Jerejak but he could not remember when. However none of the respondents has filed an affidavit deposing that he or his counsel had made an attempt if at all, and when, to file a claim in writing as required by s. 32(2) of the Act giving detail explanation as to why he could not make the claim to the police or the Public Prosecutor. Neither was there an affidavit forthcoming from the learned counsel to state whether he had made attempts to seek the assistance of the relevant authorities such as the police to allow him to interview any of the respondents while in police custody or wherever detained in order to get instructions regarding the making of the claim under s. 32(2). In the circumstances we have to draw the inevitable conclusion that the respondents had no reason whatsoever valid or otherwise to explain their failure to make the claim. Thus para. (c) of sub-s. (1) is satisfied. The learned Deputy Public Prosecutor then indicated to the court the property that would be affected by the forfeiture should the court allow the appeals. They are the following:

Appeal No. 1 – Rayuan Jenayah 05-183-92

Items affected as are numbered on the search list appearing from pages 8 to 9 of the Appeal Record:- Nos. 1, 2, 3, 4, 6, 7, 9, 12, 15, 18, 19 and 20.

Appeal No. 2 – Rayuan Jenayah 05-218-92

Items affected as are numbered on the search list appearing from pages 15 to 16 of the Appeal Record:- Nos. 3.2, 3.3, 5, 6, 7, 8, 9 and 11.

Appeal No. 3 – Rayuan Jenayah 05-226-92

Items affected as are numbered on the search list appearing on page 16 of the Appeal Record:- Nos. 1, 2, 3 and 7.

Appeal No. 4 – Rayuan Jenayah 05-247-92

Items affected as are numbered on the search list appearing from pages 11 to 13 of the Appeal Record:- Nos. 1 and 3 (page 11), No. 1 (page 12) and No.1 (page 13).

Those not affected by the forfeiture are to be returned to the respondents. Since none of the circumstances mentioned under paras (a), (b) and (c) of sub-s. (1) of the said s. 32 has taken place within three months from the date of seizure of the property affected, forfeiture automatically takes effect. Our order was merely to formalise the incidence of forfeiture as directed by the statute.

Now the fourth and the last complaint was in fact, as submitted by the learned counsel for the respondent, the main thrust of his argument. According to him s. 32 of the Act is inconsistent with art. 13 of the Federal Constitution and therefore by virtue of art. 4(1) it is to that extent void. We fail to see how his submission can legally be supported for it is really a non-starter. The Dangerous Drugs (Forfeiture of Property) Act 1988 was enacted by Parliament in pursuance of art. 149 of the Federal Constitution. Articles 13 and 149(1) read:

> 13. (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.
>
> 149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
>
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
>
> **any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13,** or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. (Bold is ours)

Even assuming therefore that s. 32 is found to be inconsistent with art. 13, by the express authority of art. 149(1), the said section shall remain valid. In other words s. 32 cannot be challenged on the ground that it is inconsistent with art. 13 of the Federal Constitution.

In this connection we need only recall the words of Suffian, LP (as he then was) when delivering the judgment of the Federal Court in the case of *Public Prosecutor v. Lau Kee Hoo* [1983] 1 MLJ 157 @ 159 on the constitutionality of the Internal Security Act 1960 (Act 82) thus:

> The ISA is legislation against subversion expressly authorized by Article 149 of the Constitution. Mr. Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to Article 5(1); because the Article itself expressly provides that any provision of law enacted under the Article is valid "notwithstanding that it is inconsistent with Article 5".

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